Order 2002-11-12
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 22nd day of November, 2002

Joint Application of **AMERICAN AIRLINES, INC.** **and** **SWISS INTERNATIONAL AIR LINES LTD.** **d/b/a SWISS** **under 49 U.S.C. §§ 41308 and 41309 for approval of and antitrust immunity for Alliance Agreement**	**Docket OST-2002-12688**

ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY FOR AN ALLIANCE AGREEMENT

By this order, we grant approval of and antitrust immunity for an Alliance Agreement[1] (the "Alliance Agreement") between American Airlines, Inc. ("American"), and its affiliates[2] and Swiss International Air Lines Ltd. ("Swiss") (collectively, the "Joint Applicants"), under 49 U.S.C. §§ 41308 and 41309, subject to the conditions described below

On June 15, 1995, the Governments of the United States and Switzerland reached an open-skies aviation agreement that promised substantial benefits to consumers and communities in both countries. The predicate for our approval and grant of antitrust immunity for the proposed Alliance Agreement is the open-skies agreement. The accord allows U.S. airlines to serve any point in Switzerland (and open intermediate and beyond rights) from any point in the United States and allows airlines of Switzerland to do the same. Our evaluation shows that open-skies initiatives encourage more competitive service, since market forces, not restrictive government regulation, discipline the price and quality of airline service.

I. Background

By Order 2000-5-13, issued May 11, 2000, the Department granted antitrust immunity to the business arrangements between American and Swissair providing for coordinated airline service.

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1 For purposes of this application, the term "Alliance Agreement" shall include the arrangements identified in this application as Exhibit JA-1; any implementing agreements in furtherance of the foregoing agreements; and any transaction undertaken pursuant to the foregoing agreements.

2 American has identified its affiliates: TWA Airlines LLC ("TWA") and American Eagle Airlines, Inc. and Executive Airlines, Inc. d/b/a American Eagle (collectively, "American Eagle"). Joint Application at 1.

By notice dated November 8, 2001, American informed the Department that it had terminated its alliance agreements with Swissair because Swissair ceased operations (see Docket OST-1999-6528-13).

By Notice of Action Taken on February 22, 2002, the Department granted Crossair Ltd. d/b/a Swiss an exemption from 49 U.S.C. 41301 to conduct scheduled foreign air transportation of persons, property, and mail between Geneva and Zurich, Switzerland, and several points in the United States; and to conduct charters under 14 CFR 212 of the Department's regulations (see Docket OST-2002-11534). Crossair had been an affiliate of Swissair. With the demise of Swissair, Crossair became Switzerland's flag carrier.[3]

By Notice of Action Taken on April 23, 2002, the Department granted the American and Crossair Ltd. d/b/a Swiss requests for statements of authorization under 14 CFR 212 of the Department's regulations to display each other's airline designator codes on flights in the U.S.-Switzerland market, among others (see Docket OST-2002-12001).

By letter dated July 1, 2002, the Department granted Crossair Ltd's application dated June 6, 2002, filed under Part 215 of our regulations, to change its name to Swiss International Air Lines Ltd. d/b/a Swiss.

II. The Alliance Agreement

The essential elements of the Joint Applicants' proposed arrangement include coordination of schedules and connecting service; the establishment of individual and joint marketing, promotion, and advertising networks; harmonization of respective service standards and joint product development; codesharing; cooperative pricing and inventory control; revenue sharing; establishment of joint strategies for selling alliance services and coordinating and allocating sales resources; joint procurement; coordinated cargo programs; coordinated ticketing; coordinated travel intermediary commission structures and incentive arrangements; frequent flyer programs; information technology and distribution systems; and the sharing of facilities and services at commonly served airports.[4] In summary, while the partners state that each airline will retain its separate identity, brand, ownership, and control,[5] the underlying objective of the proposed arrangement is to enable the companies to plan and coordinate services over their respective route networks as if there had been an operational merger among them.

III. The Joint Application

On June 28, 2002, the Joint Applicants filed for approval of and antitrust immunity for (1) a cooperative agreement (Exhibit JA-1), and (2) all agreements among the applicants that implement any part of the cooperative agreement or are entered into by the applicants under the

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[3] See Application of Crossair Ltd. d/b/a Swiss for an initial foreign air carrier permit (Docket-OST-2002-11535) filed on February 8, 2002.

[4] Application at 3.

[5] Application at 2.

cooperative agreement (hereafter the "Alliance Agreement").[6] They state that the proposed agreement will bring enhanced competition and efficiency to the U.S.-Europe market. They also state that their request is fully consistent with the U.S.-Switzerland open-skies agreement and with U.S. international aviation policy. Subsequently, American submitted additional documents and a motion for confidential treatment on July 2, 2002.[7]

The Joint Applicants maintain that the proposed alliance will enable them to develop mechanisms to enhance efficiencies, reduce costs, and provide better service to the traveling and shipping public. Furthermore, they assert that the cost synergies, benefits, and efficiencies that can be obtained from an integrated alliance will extend to customers through lower fares.[8] They state that the proposed integration of operations, planning, and marketing will better enable them to develop substantial new online service, including greater customer choice and ease of connections. The Joint Applicants also maintain that they anticipate that a range of cost synergies and efficiencies can be achieved through closer coordination of their sales and airport operations, joint promotions and marketing, joint purchasing, and cooperative yield management.

To support their belief that the public benefits from agreements such as the proposed alliance, the Joint Applicants cite the Department's December 1999 report, *International Aviation Developments: Global Deregulation Takes Off*. They claim that the report documents a range of benefits resulting from multinational alliance development, including pro-competitive changes in industry structure, improved service and price reductions, positive effects on local and national economies, and significant expansion of European carriers' networks.[9]

The Joint Applicants state that the proposed Alliance Agreement will allow them to achieve additional operating efficiencies that will translate directly into greater value for the traveling and shipping public, and generate broad economic benefits for communities across the worldwide networks of the two carriers. They maintain that the various benefits obtainable through the proposed alliance cannot be fully achieved absent antitrust immunity.[10]

The Joint Applicants contend that approval of their application will promote U.S. international aviation policy objectives by further encouraging the development of integrated global alliances. The Joint Applicants further assert that the Department, in its October 2000 report, *Transatlantic Deregulation: The Alliance Network Effect*, found alliance-based networks to be the principal driving force behind transatlantic price reductions and traffic gains. They maintain that the alliance will not substantially reduce or eliminate competition in any relevant market, making it

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6 We note that American has two other immunized alliances, one with LAN Chile, effective September 13, 1999 (Docket OST-1997-3285 / Order 99-9-9), and one with Finnair Oyj, effective July 30, 2002 (Docket OST-2002-12063 / Order 2002-7-39).

7 Included documents associated with codeshare agreements and routes. Answers to the motion were due on July 12, 2002. The motion is unopposed.

8 Application at 10 and 12.

9 Application at 12.

10 Application at 24.

a particularly suitable candidate for antitrust immunity. The Joint Applicants assert that, because the Department has acknowledged that codesharing for behind and beyond service is superior to standard interline service,[11] antitrust immunity is an essential tool in facilitating inter-airline arrangements that increase airlines' efficiency and competitiveness in the developing global marketplace. They also state that the expanded alliance will allow them to compete more effectively with the other immunized transatlantic alliances.

The Joint Applicants assert that data used to assess the competitive impact of an antitrust alliance between the Joint Applicants overstates the market position held by Swiss as of July 2002. Specifically, they compare Swiss's transatlantic service on July 1, 2002 to Swissair's transatlantic service as of July 1, 2001. They note that Swiss serves six U.S. gateways with eight daily transatlantic flights, compared to the eight U.S. gateways and 13 daily transatlantic flights served by Swissair. In addition, Swiss's transatlantic capacity as of July 1, 2002 was 43% below the transatlantic one-way seats operated by Swissair one year earlier.[12]

In the global market, the Joint Applicants argue that by providing antitrust immunity to the proposed Alliance Agreement and enabling Swiss to engage in joint operations with American they will enhance competition in the global air transport services market. They maintain that an immunized alliance will allow the partners jointly to provide fully coordinated connections, marketing, and services that will stimulate competition with other competing airlines and alliances beyond what could be achieved through simple interlining or codesharing.[13]

In the U.S.-Europe market, the Joint Applicants maintain that the proposed alliance will not substantially reduce competition. They maintain that virtually all competitors in the transatlantic market are participating in alliances and cite Order 2000-10-13 (SAS/Icelandair) as evidence that the U.S.-Europe marketplace is highly competitive.[14] They assert that American/Swiss would have a combined market share of 11% of U.S.-Europe annual passenger bookings, versus 22.05% for United/Lufthansa/SAS/Austrian/Lauda, 18.72% for Delta/Air France/Alitalia/Czech, and 8.67% for Northwest/KLM.[15]

In the U.S.-Switzerland market, the Joint Applicants assert that the proposed alliance will not have an adverse impact on competition. They calculate the combined U.S.-Switzerland market share for American/Swiss at 49.2%.[16] They compare that share to the market shares for (1) the Star Alliance[17] in the U.S.-Austria market (63%), the U.S.-Denmark market (52%), and the

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11 The Joint Applicants cite Order 96-5-12 (Docket OST-1996-1116) and Order 2000-4-22 (Docket OST-1999-6528).

12 Application at 15.

13 The record indicates that the proposed alliance will affect about 20,160 behind- and beyond-gateway city pairs where the alliance will create new on-line service. See Exhibit JA-4A.

14 Application at 17, citing Order 2000-10-13, October 13, 2000, page 10.

15 Application at 16 and Exhibit JA-7.

16 Application at 17 and Exhibit JA-8.

17 Defined by the Joint Applicants as Lufthansa, Lauda, Austrian, SAS, and United. See Exhibit JA-8.

U.S.-Germany market (47%) and (2) SkyTeam[18] in the U.S.-Italy market (48%) and the U.S.-France market (41%).

The Joint Applicants further assert that nonstop service is provided in the U.S.-Switzerland market from Atlanta (Delta) and New York (Continental). Online single connecting services are provided through Paris, Frankfurt, and Amsterdam, among other European hubs. As such, they believe that international aviation alliances and partnerships enable U.S. airlines to carry a large volume of traffic between the U.S. and Switzerland. They cite U.S.-Switzerland market shares for United/Lufthansa/SAS/Austrian/Lauda (12.68%), Delta/Air France/Alitalia/Czech (16.74%), and Northwest/KLM (5.74%)[19] as evidence of opportunities for carriers to respond to any competitive concerns in the U.S.-Switzerland market. The Joint Applicants also argue that the U.S.-Switzerland open-skies regime, which permits open entry for U.S. and Swiss airlines and ease of expansion through codesharing or other cooperative arrangements over a variety of intermediate points, ensures that competition in this market is and will remain vigorous.

In the city-pair markets, the Joint Applicants maintain that only one overlap market exists: New York-Zurich. They further assert that ample competition will remain. They note that Continental provides nonstop service between Newark and Zurich, accounting for a 15.4% share of passenger bookings, while the immunized alliances of Delta/Air France/Alitalia/Czech (10.15% of passenger bookings) and United/Lufthansa/SAS/Austrian/Lauda (4.43% of passenger bookings) also serve the New York–Zurich market.[20] Citing Order 96-6-33,[21] the Joint Applicants note that the Department found connecting services may well be a competitive force, even for the time-sensitive business travelers. The Joint Applicants further assert that, given the development and growth of competing immunized alliances, the Department's finding has even greater force today.

The Joint Applicants again cite Order 96-6-33,[22] where Delta and Swissair received antitrust immunity for the New York-Zurich market. They note that this market was then served by three nonstop competitors – Delta, Swissair, and American – and that the antitrust immunity reduced the number of nonstop competitors to two: Delta/Swissair and American. They assert that the same scenario exists today, with three nonstop competitors – American, Swiss, and Continental – and that antitrust immunity will reduce the number of nonstop competitors to two: American/Swiss and Continental. They further claim that the Department should reach the same conclusion it did in the Delta/Swissair/Sabena proceeding and find that a carve-out remedy against American/Swiss for the New York-Zurich route would be "unnecessary and contrary to the public interest."[23]

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18 Defined by the Joint Applicants as Air France, Alitalia, Delta, and Czech. See Exhibit JA-8.

19 Application at 18 and Exhibit JA-8.

20 Application at 19 and Exhibit JA-10.

21 Docket OST-1995-618-47, pp. 11-17 (Delta/Swissair/Sabena).

22 Docket OST-1995-618-47 (Delta/Swissair/Sabena).

23 Application at 21.

The Joint Applicants assert that slots are available at Zurich airport, noting that U.S. carriers were granted the slots they requested at Zurich airport with only minor deviations and Delta received an additional slot upon request. Furthermore, the Zurich airport authorities approved construction of a new terminal that will ultimately increase passenger facilities, gates, and stands by 35%. In addition, slots are available at Geneva airport.[24] Finally, the Joint Applicants note the constraints that will be imposed by a treaty concluded between, but not yet ratified by, Switzerland and Germany that limits the number of flight movements over German territory on approach to Zurich airport. However, they claim that these limitations, and any resulting delays, will be borne by all carriers, will not disproportionately affect U.S. carriers, and will not adversely impact any U.S. carrier's ability to serve Zurich.[25]

No answers have been filed.[26]

IV. Decision Summary

American and Swiss have applied for approval of and antitrust immunity for an Alliance Agreement under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the partners. We find that the arrangement should be approved and granted antitrust immunity, to the extent provided below. Our examination of the proposal leads us to find that the proposed alliance will enhance competition overall and allow the airlines to provide better service and enable them to operate more efficiently. We also find that it is unlikely that the arrangement – subject to the conditions included here – will substantially reduce competition in any relevant market. Finally, our actions here will allow the Joint Applicants to maximize fully the various pro-competitive and pro-consumer benefits associated with integrated alliances that we foresaw resulting from the fundamental liberalization of air services under the U.S.-Switzerland open-skies accord.

We will require the Joint Applicants (1) to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through prices between the United States and Switzerland, as well as between the United States and the homelands of foreign airlines participating with U.S. airlines in other immunized alliances; (2) to file all subsidiary and/or subsequent agreements with the Department for prior approval; and (3) to resubmit for review the pertinent Alliance Agreement within five years from the date of issuance of the final order in this case. We also find it in the public interest to direct Swiss to report full-itinerary O&D survey data for all passengers to and from the United States (similar to the O&D Survey data reported by U.S. airlines and its partner American).

Finally, we have determined that it is appropriate and consistent with the public interest to issue a final decision in this case now. Interested parties have had full opportunity to comment on

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[24] Application at 30.

[25] Application at 30-31.

[26] By letter filed in the docket, the Joint Applicants have indicated their willingness to accept the conditions imposed herein.

these matters. No answers were filed. We have also determined that the proposed alliance presents no significant competitive issues requiring further consideration. We therefore will dispense with the issuance of an Order to Show Cause and issue a final order approving this unopposed application.

V. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

The Joint Applicants applied for approval of and antitrust immunity for an Alliance Agreement under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the partners.

Under 49 U.S.C. § 41308, the Department has the discretion to exempt a person affected by an agreement under § 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that the public interest requires that we grant antitrust immunity.

Under 49 U.S.C. § 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and is not in violation of the statute before granting approval.[27] The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[28] The public benefits include international comity and foreign policy considerations.[29]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[30] If the record shows that the agreement will substantially reduce, or eliminate, competition, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[31]

VI. Approval of the Agreement

The United States and Switzerland finalized an open-skies agreement in June 1995. In doing so, the two countries formally recognized that restrictive bilateral aviation relationships adversely

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27 Section 41309(b).

28 Section 41309(b)(1)(A) and (B).

29 Section 41309(b)(1)(A).

30 Section 41309(c)(2).

31 *Id.*

affect important cultural and economic ties, and restrict the growth of trade between countries. The U.S.-Switzerland market is governed by an open-skies agreement that has eliminated barriers to new entry, expansion, and competition that were earlier created by restrictive government regulation. Such an agreement maximizes competitive opportunities, including the flexibility for all U.S. and affected foreign airlines to operate their own direct services, or joint services with another airline. By so doing, an open-skies agreement also recognizes the value of airline networks and provides the opportunity for airlines to offer the services covered by the liberalized regime, either individually or as partners in an alliance.

The Department has found substantial consumer and competitive benefits ensuing from open-skies agreements and from the structural changes that have occurred in the global airline system, such as alliances.[32] Such alliances allow the partners to achieve greater operational efficiencies and to expand their route networks on an integrated and coordinated basis.

It is against this background that we have decided to approve and grant antitrust immunity to the American-Swiss Alliance Agreement, subject to the conditions noted.

Public Benefit Summary

We find that the proposed alliance would provide important public benefits. The proposed arrangement should benefit consumers by offering the traveling public new integrated services and additional competition for existing alliances and single carrier services. We have previously determined that the pro-competitive effects of global alliances are particularly evident in behind- and beyond-markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere interlining with a multitude of new on-line services.[33]

In this case, we note that American's worldwide network provides consumers with service to 250 cities in 47 countries and that Swiss serves 115 cities in 53 countries. The record indicates that American and Swiss currently serve 19 common airports, seven of which are in the United States.[34] The carriers overlap in only one city-pair market: New York-Zurich. Thus, the proposed arrangement will benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities behind and beyond major gateways.

Our recent evaluations of international alliances show that they stimulate traffic in these connecting markets and thereby increase competition and service options in the overall international market and increase overall opportunities for the traveling public and the aviation

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32 See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999; and *International Aviation Developments: Transatlantic Deregulation, The Alliance Network Effect (*Second Report), U.S. Department of Transportation, Office of the Secretary, October 2000

33 See Order 96-5-12 (Docket OST-1996-1116) at 17-18.

34 See Exhibit JA-4 at 3 and Exhibit JA-5 at 1.

industry.[35] The proposed alliance would allow the partners to improve the efficiency of their operations and to otherwise work together to improve service not only in the U.S.-Switzerland market but also in the U.S.-Europe market.

Competitive Summary

We also find it unlikely that the proposed arrangement, as conditioned, would substantially reduce or eliminate competition in any relevant market. The Joint Applicants compete head-to-head in a single city-pair market, and several other U.S. and foreign airlines provide competitive service in this market and other relevant transatlantic markets.

We find that the arrangement will benefit overall competition in the affected markets. The proposed alliance will enable the partners to operate more efficiently and to provide the public with enhanced service options. Furthermore, we find that the integration of the partners' services will provide pro-competitive advantages that outweigh any possible negative effects on competition in the relevant markets, subject to the conditions described below.

A. Antitrust Issues

The Joint Applicants state that the Alliance Agreement will allow them to develop mechanisms to improve efficiency, expand various benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining the separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the proposed arrangement's intended commercial and business effects are equivalent to those resulting from a merger. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.[36]

The Clayton Act test requires the Department to consider whether the Alliance Agreement will substantially reduce competition by eliminating actual or potential competition between American and Swiss so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.[37] To determine whether a transaction is likely to violate the Clayton Act, the Department considers whether the transaction is likely to create or enhance market power, market power being defined as the ability to profitably maintain prices above competitive levels or to reduce product and service quality below competitive levels for a significant period of time. To determine whether a proposed transaction is likely to create or enhance market power, we primarily consider whether the transaction would significantly increase concentration in the relevant markets, whether the transaction raises concern about

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35 See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999; and *International Aviation Developments: Transatlantic Deregulation, The Alliance Network Effect (*Second Report), U.S. Department of Transportation, Office of the Secretary, October 2000

36 Order 92-11-27 at 13.

37 *Id.*

potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed transaction's potential for harm.

The relevant markets requiring a competitive analysis are: first, the U.S.-Europe market; second, the U.S.-Switzerland market; and third, the individual city-pair markets. We are using data from Swissair as a proxy for Swiss. We recognize that, as argued by the Joint Applicants (Application at 15), the use of Swissair data overstates the market position of Swiss at the time of this application. We recognize that, based on the ongoing expansion of Swiss' operations, it is likely, to some degree, to fill the void created by the demise of Swissair.

1. The U.S.-Europe Market[38]

We find that the Alliance Agreement should not diminish competition in the U.S.-Europe market.[39] During the 12 months ended September 2001, American's nonstop passenger market share was about 8%, while Swiss's nonstop passenger market share was approximately 3.4%. The proposed American/Swiss partnership would have had a nonstop passenger market share of about 11.4%. The nonstop passenger market share for the oneworld alliance, including Swiss (British Airways/American Airlines/Aer Lingus/Iberia/Trans World/Finnair) would have been 28.13%. In contrast, Star Alliance partners' (United Air Lines/Lufthansa/SAS/Icelandair/ Austrian Airlines/Air New Zealand/Lauda Air/bmi) nonstop passenger market share was 21.64%; SkyTeam partners' (Delta Air Lines/Air France/Alitalia/Czech Airlines) had a 17.92% nonstop passenger market share; and Northwest Airlines/KLM had an 8.87% nonstop passenger market share.

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38 Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended September 2001.

39 The term "Europe" is identified here as those countries listed in the U.S. Department of Transportation, Bureau of Transportation Statistics Office of Airline Information, *World Area Codes*.

As we have previously determined, the U.S.-Europe market is highly competitive in terms of service.[40] American Airlines,[41] Continental Airlines, Delta Air Lines, Northwest Airlines, United Air Lines, and U.S. Airways provide scheduled passenger service in this market from their hubs, either individually or in conjunction with an existing alliance. The market is also served by more than 40 foreign airlines, principally from hubs in their homelands.

2. The U.S.-Switzerland Market

The American/Swiss partnership will have the largest market share in the U.S.-Switzerland market. Nonetheless, based on our evaluation, we do not find that the proposed arrangement will enable the Joint Applicants to charge supra-competitive prices or to reduce service below competitive levels.

Swiss carried about 79% of total passengers during the 12 months ended September 2001. Delta carried about 11.5%, followed by American (7.65%) and Continental (5.86%). American currently operates two nonstop flights to Switzerland (Zurich): one from Dallas and one from New York. Swiss provides nonstop service in the Boston/Chicago/Los Angeles/Miami/New York/Newark/Washington, D.C.-Zurich markets and the New York-Geneva market. Delta provides nonstop service in the Atlanta-Zurich market and Continental in the Newark-Zurich market. Other alliances between a U.S. airline and one or more foreign airlines offer competitive connecting services between the United States and Switzerland. For these reasons, we find that the proposed transaction would not result in any substantial loss of competition in the U.S.-Switzerland market.

The U.S.-Switzerland market is governed by an open-skies agreement that eliminates all bilateral agreement barriers to entry and provides the opportunity for other airlines to freely enter and meet the needs of consumers in this market. Therefore, despite the large market share held by American's foreign partner in its homeland market, we see no reason why U.S. airlines could not begin new service to Switzerland if the Joint Applicants charge supra-competitive fares or lower service below competitive levels.[42]

3. The City-Pair Markets

We have reached the same conclusion with respect to the city-pair markets at issue in this proceeding.

There are four local markets that raise competitive concerns: the Chicago/Dallas-Ft. Worth/ Miami-Zurich markets because the partners now conduct joint codeshare operations in these city-pair markets and we also note the partners' potential hub-to-hub strength; and the New York-Zurich market because American and Swiss now provide competing nonstop service.

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40 For example, see Orders 2000-4-22 at 11 and 2000-10-13 at 10.

41 Including service provided by Trans World Airways, Llc.

42 See Order 2002-6-18 at 9 (Delta-Korean Air Lines request for antitrust immunity).

As noted, American and Swiss only conduct joint codeshare operations in the Chicago/Dallas-Ft. Worth/Miami-Zurich markets. Importantly, the partners' codeshare agreement does not provide for guaranteed block-space reservations. Accordingly, neither American nor Swiss purchases or guarantees the seats allocated to it by the other. Seats are allocated only for purposes of inventory management. The operating airline maintains control over inventory on the codeshare flights.[43] In these circumstances, as we have found in recent similar cases, the partners do not price compete in these city-pair markets.[44]

Moreover, one or more U.S. airlines and their airline partners offer competitive service in each of the nonstop markets now served by either American or Swiss. For example, the Delta/Air France and the Northwest/KLM immunized alliances serve the Chicago-Zurich market over Paris and Amsterdam, respectively. United/Lufthansa serves the Chicago/Washington, D.C.-Zurich markets over Frankfurt, while United/SAS serves the New York/Chicago/Washington, D.C.-Geneva markets over Copenhagen. Both Continental and Delta serve the Dallas-Ft. Worth-Zurich market over Newark and Atlanta, respectively. Finally, Continental, Delta/Air France, and Northwest/KLM serve the Miami-Zurich market over Newark, Paris, and Amsterdam, respectively.

These services offer consumers an effective choice, and this choice should effectively discipline the proposed operations of American/Swiss.

The record shows that the partners now compete on a nonstop basis in the New York-Zurich market. While we are concerned about the potential loss of competition in the New York-Zurich market, and we understand that the proposed alliance will necessarily mean the diminution of the number of competitive players in this market, we are also mindful that there will remain a significant competitor to the alliance for nonstop travel, and there will remain a number of competitive one-stop and connecting services.

For these and other reasons discussed below, we have determined to grant the antitrust immunity for this market, while affirming that we will closely monitor the competitive environment in the New York-Zurich market to determine whether our actions here continue to be appropriate and in the best interests of consumers. This will allow us to determine if, as the applicants contend, they will operate to the benefit of consumers and competition. At the same time, we find that the potential for new entry in the New York market, combined with actual competition, mitigates our competitive concerns sufficiently for us to approve antitrust immunity for this market.

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43 See Codeshare Agreement between American and Swiss (formerly Crossair) (Docket OST-2002-12001-1) at 4 of Agreement

44 See Order 2001-1-19 at 10, Docket OST-2000-7828 (The United-Austrian/Lauda/Lufthansa/SAS request for antitrust immunity).

In reaching this conclusion, we find that the loss of competition in the New York-Zurich market should not result in serious competitive harm to passengers for several reasons.

The New York metropolitan area is the largest air traffic market in the United States-Europe market. Consequently, the New York markets are most attractive to new carrier entry in the event of supra-competitive fare levels, even without access to large domestic feed traffic.[45]

A potential new entrant in the New York market would not be required to overcome an American-dominated hub. For the twelve months ended December 2001, in the New York-Europe market, American-TWA and its foreign partners operated 15.5 percent of the departures from New York, and carried 13.3 percent of the passengers from New York. By comparison, Delta and its foreign immunized partners operated 22.7 percent of the departures, and carried 22.4 percent of the passengers; United and its foreign immunized partners operated 13.5 percent of the departures, and carried 13.3 percent of the passengers; Continental operated 16.2 percent of the departures, and carried 14.9 percent of the passengers; and British Airways' share of the market was about 9 percent for both departures and traffic.[46]

American does not dominate U.S. domestic feed traffic coming to New York. For the twelve months ended March 2002, American-TWA carried about 18 percent of total passengers. In comparison, Continental carried about 21 percent of total passengers and Delta about 19 percent.[47] As already determined in similar cases, New York is highly competitive. See Order 2001-12-18 at 16 (Delta/Air France/Alitalia/Czech Airlines request for antitrust immunity) and Order 96-5-26 at 25 (Delta/Swissair/Sabena/Austrian request for antitrust immunity). Moreover, the record of this case indicates that there are no slot restrictions or any other airport facility limitations at Zurich Airport (see Application at 29-31).

B. Public Interest Issues

Under § 41309, we must determine whether the Alliance Agreement would be adverse to the public interest. Section 41308 requires a similar public interest examination. Except as noted, we find that approval of the Alliance Agreement will be in the public interest.

For the reasons explained above, we have found that approving the Alliance Agreement will benefit the traveling public, taking into account the conditions imposed by the Department, because it will enable American and Swiss to offer new services and to operate more efficiently. We conclude that the proposed arrangement is unlikely to reduce competition substantially in any relevant markets, and is otherwise in the public interest.

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45 See Order 96-5-26 at 25 (Delta/Swissair/Sabena/Austrian request for antitrust immunity).

46 *Id.*

47 Source: O&D Survey data for the year ending March 2002.

VII. Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to the Alliance Agreement approved by us under § 41309 if we find that immunity is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that the public interest requires the grant of antitrust immunity.

The record shows that American and Swiss are unlikely to proceed with the Alliance Agreement without antitrust immunity.[48] The Joint Applicants claim that they cannot accomplish the public benefits that they seek to achieve through the formation of this alliance absent antitrust immunity. They indicate that they plan to coordinate their operations, including pricing, scheduling, route planning, marketing, sales, and inventory control. They state that their proposed integration of services will surely expose them to antitrust risk.

Since the antitrust laws let competitors engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services would be found to violate the antitrust laws, subject to the conditions being imposed here by us. Nevertheless, the record suggests that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant their request. The record also persuades us that they will not proceed without it.

While concluding that we should approve and give immunity to the alliance, we find, as discussed next, that certain conditions are necessary to allow us to find that our actions in these matters are in the public interest.

VIII. IATA Tariff Coordination Issue

As we have found in earlier decisions, it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore have decided to condition our approval and grant of antitrust immunity to the Alliance Agreement by requiring the Joint Applicants to withdraw from participation in any IATA tariff conference activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and Switzerland, or between the United States and any other countries designating an airline that has been or is subsequently granted antitrust immunity by the Department for participation in similar alliances.[49]

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[48] Application at 14. Also see Recital 3 and Article III, Section 3.2 of the Alliance Agreement (Exhibit JA-1).

[49] This condition currently applies to prices between the United States and the Netherlands; between the United States and Germany (See Order 96-5-27 at 17); between the United States and Denmark, Norway, and Sweden (See Order 96-11-1 at 23); between the United States and Austria (See Order 2001-1-19 at 16); between the United States and Chile (See Order 99-9-9 at 21); between the United States and Korea (See order 2002-6-18 at 10-11); between the United States and Malaysia (See Order 2000-10-12 at 14);

Under this condition, the Joint Applicants may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Switzerland, and between the United States and the homeland(s) of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.[50]

We find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities among the Joint Applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we find supports immunity for the proposed activities is the potential for increased price competition between the partners and other carriers, particularly other international alliances. We have found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the pass through of economic efficiencies realized by the Alliance to consumers in the form of lower prices. We have previously found in similar cases that competition is undermined if the Joint Applicants are permitted to continue tariff coordination within IATA.

IX. O&D Survey Data Reporting Requirement

We have access to market data where U.S. carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey codeshare reports for certain large alliances and have directed all other U.S. airlines to file reports for their transatlantic codeshare operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate

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between the United States and Iceland (See Order 2000-10-13 at 16); between the United States and Panama (See Order 2001-2-5 at 14); between the United States and New Zealand (See Order 2001-4-2 at 3); between the United States and the Czech Republic, France, and Italy (See Order 2002-1-6 at 7); and between the United States and Finland (*See* Order 2002-7-39 at 10). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (See Dockets OST-96-1116 and OST-95-618).

50 In addition to the foreign applicants homeland, under this condition, the partners could not participate in IATA discussions of the total ("through") price (See 14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in Austria, Chile, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Italy, Korea, Malaysia, the Netherlands, New Zealand, Norway, Panama, and Sweden, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitrary or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

the economic and competitive consequences of the decisions we must make on international air service.

We must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. As in previous cases,[51] we have decided to require Swiss to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).[52]

To prevent this reporting requirement from having any anticompetitive consequences, we have decided to grant confidentiality to the Swiss Origin-Destination reports and special report on codeshare passengers. Currently, we grant confidential treatment to all international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign airlines that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international O&D Survey data to air carriers directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct Swiss to provide certain limited Origin-Destination data to the O&D Survey, Swiss is not an air carrier within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." Swiss accordingly would have no access to the data filed by U.S. air carriers. Moreover, we would keep Swiss's submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

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51 See, *e.g.,* Order 2002-7-39 at 12, Docket OST-2002-12063 (American/Finnair request for antitrust immunity).

52 Consistent with our determinations in Orders 96-7-21, 96-11-1, and 99-9-9 we intend to request other foreign airline partners of immunized international alliances to submit O&D Survey data and condition any further grants of antitrust immunity on provision of such data. We will treat the foreign airlines' O&D data as confidential, will not allow U.S. airlines any access to the data, and will not allow foreign airlines any access to U.S. airline O&D Survey data. We will use these data only for internal analytical purposes.

X. Computer Reservations System (CRS) Issues

Another competitive issue concerns ownership interests that the Joint Applicants may have in competing CRSs. We note that the Joint Applicants recognize that the grant of immunity would not extend to their management of any interest they may have in individual CRSs.[53]

XI. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreement could raise important consumer issues and "holding out" questions, if the Joint Applicants choose to operate under a common name or use "common brands," they would have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more airlines to be unfair and deceptive and in violation of the Act unless the airlines give reasonable and timely notice to passengers of the actual operator of the aircraft.[54]

XII. Summary

We grant approval and antitrust immunity to the Alliance Agreement, as described in this order. We also direct the Joint Applicants to resubmit the Alliance Agreement for review before five years from the date of issuance of this order. However, the Department is not authorizing the Joint Applicants to operate under a common name. If they decide to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also direct the Joint Applicants to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities relating to through fares, rates, or charges applicable between the United States and Switzerland, and/or between the United States and any other countries whose designated airlines participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity by the Department; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval. We also direct Swiss to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).

ACCORDINGLY:

1. We approve and grant antitrust immunity to the Alliance Agreement between and among American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Swiss International Air Lines, Ltd., in so far as the Alliance Agreement relates to foreign air transportation, and subject to the provisions that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses;

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53 Application at 25-26.

54 See 14 C.F.R. Part 257.

2. We direct American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Swiss International Air Lines Ltd., to resubmit their Alliance Agreements for review before five years from the date of issuance of the final order in this case;

3. We condition our grant of approval and immunity to require American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Swiss International Air Lines Ltd. to withdraw from participation in any International Air Transport Association tariff conference activities that discuss any proposed through fares, rates, or charges applicable between the United States and Switzerland, and/or between the United States and any other countries whose designated airlines participate in similar transactions with U.S. airlines or are subsequently granted antitrust immunity by the Department;

4. We direct Swiss International Air Lines Ltd. to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner American Airlines, Inc.). The full itinerary record is defined as the passenger's complete itinerary from origin to destination as opposed to the abbreviated gateway record reported under T-100(f);

5. We direct American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Swiss International Air Lines Ltd. to submit any subsequent subsidiary agreements implementing their Alliance Agreements for prior approval;[55]

6. We direct American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Swiss International Air Lines, Ltd. to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use common brands;

7. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3 to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;

8. We defer action on the motions filed by American Airlines, Inc. (and its affiliates TWA Airlines LLC, American Eagle Airlines, Inc., and Executive Airlines, Inc. d/b/a American Eagle) and Swiss International Air Lines Ltd. for confidential treatment of data and information.

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[55] Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all contractual instruments that may materially alter, modify, or amend the Alliance Agreement. Any appropriate documents shall be submitted to the Director, Office of Aviation Analysis, Room 6401.

9. This order is effective immediately;

10. We may amend, modify, or revoke this authority at any time without hearing; and

11. We shall serve this order on all persons on the service list in this docket.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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